"The American Civil Liberties Union raised both federal and non-federal questions in the proceedings (see Opinion of Court, p. 4), and the opinions do not expressly declare upon which ground the judgment is based. (See *Enterprise Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U. S. 157 (1917), *Fox Film Co. v. Muller*, 296 U. S. 207 (1935)[2a]; *Chicago B. & Q. Ry. Co. v. Illinois*, 200 U. S. 561 (1905).)

"Petitioners request that the opinions be modified to express whether the statute is in conflict with the Constitution of the State of California or the Constitution of the United States."

We think this is a recognition by the Petitioners themselves, that the judgment of the California Supreme Court rested on a non-federal ground.

The Respondent in its Answer to Petition for Rehearing, (p. 1) urged upon the Court below that, "There is adequate state constitutional basis to support the decision and judgment of this (the California Supreme) Court." That Court denied a rehearing.

Moreover, the core of the controversy in the California Courts was the effect of, and the present applicability of, an earlier decision of that Court, holding invalid in 1940, a somewhat similar "Loyalty Oath".

Danskin v. San Diego Unified School District, 28 Cal. 2d 536.

The California Supreme Court ruled in the instant case that (Appendix "A", to Petition, p. 9), "The present Statute thus has the same vice which caused us to

[2a] The Respondent relies on this decision of this Court, also.

strike down its predecessor section in *Danskin*." In arriving at its conclusion, the Court cited *Danskin* half a dozen times, and a major portion of its decision in the instant case consists of extended quotations from its opinion in that case.[4] Indeed, the Justices of the California Supreme Court in the minority, essentially took issue with the majority, as to the import of *Danskin*, stating, (Appendix "B" to Petition, p. 6): "It therefore does no violence to due process nor to the principles enunciated by this court in the *Danskin* case, *supra*, relied upon by the majority opinion", thus acknowledging that the majority of the Court posited its ruling upon the *Danskin* case.

It is to be further noted that the California District Court of Appeal recognized that the Respondent here "relied principally upon *Danskin v. San Diego Unified School District, supra*." (Appendix C to Petition, p. 9); and concluded (Appendix C. to Petition, p. 15) that the distinction "between the *Danskin* case and the instant matter is clear." That Court, essentially followed the request urged upon it by the Petitioners there that the California Courts "re-examine and distinguish *Danskin* in view of the changing times since that decision was handed down." (Alternative Writ, etc., p. 9.)

Because the District Court of Appeal had "distinguished" the *Danskin* decision, and ruled that it was no longer applicable, the Respondent herein in its Peti-

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[4]The Respondent's Memorandum of Points and Authorities in Support of Petition for Writ of Mandate, filed in the California courts, had resorted to the same pattern. (See pp. 3, 5, 7, 11, 12, 13, 14, 22, 23, 24, and 25.) The last four pages comprising the "conclusion" of the Memorandum, is no more than an elaborate quotation from the *Danskin* case.

tion for Hearing to the California Supreme Court, seeking a review of, and a reversal, of the judgment of that California intermediate Appellate Court, urged the Supreme Court of California to grant a hearing stating (Petition for Hearing, p. 2):

> "Hearing should be granted by this (the California Supreme Court) Court because it is necessary to settle an important state-wide question of law, namely the constitutionality of Education Code §10505 which requires the signing of a 'Statement of Information', under penalty of perjury, as to advocacy and organizational labeling as a condition for the use of school auditoriums for public meetings.
>
> "*Hearing is also necessary by this Court in order to settle the important question of law as to the meaning of the free speech guarantee in this state and the meaning of this Court's decision in Danskin v. San Diego Unified School District*, 28 Cal. 2d 536 *by reason of the fact that the court below ruled that the Danskin case no longer represented the law.*" (Italics supplied.)

The highest Court of California did grant a hearing, and rejected the interpretation placed upon the *Danskin* case by the California District Court of Appeal.[1]

Accordingly, the decision which the petitioners seek to review in this Court, is no more than a ruling of a state court interpreting and applying a former ruling

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[1] It is noteworthy that the Justices of the California Supreme Court who were parties to the "decision" the validity of the District Court of Appeal. (Appendix "B" to Pet., pp. "A" and "B," pp. 7, 8, 9 and 10.)

made by a state Court, posited upon the provisions of a state constitution.

Additionally, in adhering in the instant case to its views expressed earlier in the *Dayskin* case, the California Supreme Court implicitly reaffirmed the principle established in that case—a principle of California state law—and a "Loyalty Oath" requirement, in the circumstances of this case, is illegal because it is improper "to require proof from any persons or groups that they are not subversive elements". (The *Dayskin* case, *supra*, at p. 548.)

In any event, the California statute set aside by the California Supreme Court here is manifestly unconstitutional, if there are applied to it the principles of the *Speiser* case, accepting the gloss on that case by this Court in *Konigsberg v. State Bar of California*, 366 U. S. 36.

Here, as in *Speiser*, the burden of proof is shifted to the applicant.

In *Speiser* the striking of the exemption did not automatically require the granting of the exemption (357 U. S. 513, 517); similarly, Education Code Section 10503[3] provides that the School Board (as the tax assessor in *Speiser*) may require the furnishing of such additional information as it deems necessary to determine whether there is a violation of Section 10504.

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[3] See page 2

It is to be noted that Section 10504 defines a crime[5] namely, the use of school property for certain illegal purposes; accordingly, the Board, in effect, makes a determination based upon the statements contained in the oath, and such other information as it may secure, whether the applicant has committed the crime proscribed in Section 10504; (and, additionally, in effect, whether the applicant has violated the Federal Smith Act and the California Criminal Syndacalism Act, as did the tax assessor in *Speiser*).

Hence, the effect of these Education Code Sections is to place the burden of proof of non-commission of a crime upon the applicant.

These sections were adopted by the California legislature in 1952 after *Danskin, supra*, and particularly after *Goodman v. Board*, 48 Cal. App. 2d 731.

Prior to the present provision, the then section was construed in *Goodman* as placing the burden of proof on the Board; Section 10504 expressly shifted the burden of proof to the applicant.

In any event, on this issue the Petitioners do not seem to be in disaccord with the Respondent; for they say (Petition, p. 22),

> "The first part of the investigation is the required statement of information (Calif. Education Code, Sec 10565). If the applicant furnishes the statement of information, the school board may

[5] The criminal sanction is omitted by the Petitioners in their reference (Pet. p. 5, fn 6) to the statute. Emphasis involved, also omitted by the Petitioners is the summary caution of that statute, declared by the California Legislature which reads: "Use to further program for overthrow of Government by force is a misdemeanor."

> need to make further inquiry;" this because . . . "the governing boards of local school districts (have) the duty of investigating and determining when use of school property" should be denied." (Petition, p. 10.) They also assert, (p. 22)
>
> "This is the first step in the investigation of the applicant."

Accordingly the statutory provisions here, similar to the pattern of the California Legislature's enactment, before this Court in *Speiser*, are indistinguishable in constitutional import, from those set aside in *Speiser*; accordingly *Speiser* is so definitely dispositive of that issue, that no review by this Court is necessary.

In any event the Petitioners seemed to treat the Legislature of California, as the equivalent of the entire State of California (Petition, pp. 14, 17, and 19), and they state (p. 7): "It is, of course, entirely reasonable for a *state* to attempt to protect itself from violent overthrow."

We agree. But that obligation is upon the California Courts too; for the California Legislature is only one of the three departments of government in the State of California.

In the Civic Center Act, Education Code, Section 10556, page 2, the California Legislature established school buildings as Civic Centers "where organizations may meet and discuss, from time to time, in the open forum, any subjects and questions which, in their judgment pertain to the educational, political, economic, artistic, and moral interests of the citizens of the communities in which they reside." The following section 10557, expressly provides that a meeting of "any organization" shall not interfere with school activities. There has been a claim in the California courts and there is no claim here by the Petitioners, that the proposed meetings of the Respondent or the over current and highly important subject "The Bill of Rights," will in any manner interfere with school purposes.

Pursuant to its authority and duty, under the Constitution of California, as the guardian both of the security of the state and the rights of the people of California, the Supreme Court of California has found that there is no danger clear, present,[10] or at all, warranting the abridgment, in the instant case, of the rights of assembly protected by the California Constitution, for the Court said (Petition, Appendix "A", p. 14) "No such finding (that Communists had advocated concrete action in public meetings in California) was made" by the California Legislature. The Court went on to add, ". . . and we apprehended that no such finding could be supported by substantial evidence."

Indeed, the California Legislature in its current session, lasting six months, and just concluded, *rejected* a proposal to enact a new Loyalty Oath requirement, similar to the one adopted by the Petitioner Board of Education of the City of Los Angeles, *supra*, at page 6, Appendix hereto, "A". The text of the Bill is set forth in Appendix "B" annexed hereto.

The proposal passed the Assembly of California on April 18, 1961; reaching the California Senate it was referred to the Committee on Education, where it died.[11]

We think either or both of the following inferences may be drawn from the non-action of the California Legislature:

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[10]The California Supreme Court has made it clear, but recently, in *Kerr v. Superior Court of Los Angeles*, 52 Cal. 2d 340, that it accepted the version of that rule, as explained in *Dennis v. United States*, 341 U. S. 494, and as reformulated by Judge Learned Hand, indeed, in the instant case it applied the "clear and present danger" test. See Appendix "A" to Pet., p. 14.

[11]California Assembly Weekly History for Monday, May 15, 1961, page 351.

1. A majority of the California Legislature accept the decision of the California Supreme Court in this case, as expressing sound policy for the State of California.

2. The California Legislature is now of the view that there is no danger in California to warrant, and there is no need for, a "Loyalty Oath" in connection with public meetings at Civic Centers in California.[12]

In *Parker v. Los Angeles County*, 338 U. S. 327, this Court dismissed the Petition there, to afford the California Supreme Court an opportunity to decide the issues in that case, under local law; in the instant case, the California Supreme Court has done just that, with respect to the issues here.

Conclusion.

Accordingly, the Petition should be denied, because the judgment is grounded on an adequate non-federal base.[13]

Respectfully submitted,

A. L. Wirin,
Fred Okrand,
Attorneys for Respondent.

[12] We refer to California Legislature [illegible] of the United States Supreme Court [illegible] the California Legislature [illegible]

[13] Compare *[illegible]* 2[illegible] U. S. 27 [illegible] 321 U. S. 222, [illegible] 335 U. S. 297.

Appendix "A".

LOS ANGELES CITY SCHOOL DISTRICTS

STATEMENT OF INFORMATION

.....

(Name of Organization)

"The undersigned states that, to the best of his knowledge, the school property for use which application is hereby made will not be used for the commission of any act which is prohibited by law, or for the commission of any crime including, but not limited to, the crime specified in Sections 11400 and 11401 of the California Penal Code. This statement is made under the penalties of perjury:"

.....	.....
Signature	Title or Office Held
.....	.....
Street	Phone (Business Hours)
.....	.....
City Zone	Date

Please complete this form and return to:

Civic Center Permit Office
Los Angeles City Board of Education
P. O. Box 3307, Terminal Annex
Los Angeles 54, California

Appendix "B".

Amended in Assembly April 13, 1961
Amended in Assembly April 12, 1961
Amended in Assembly March 24, 1961

CALIFORNIA LEGISLATURE, 1961 REGULAR (GENERAL) SESSION

ASSEMBLY BILL No. 1559

Introduced by Messrs. Francis, Levering, Shell, Reagan, Bruce F. Allen, Belotti, Britschgi, Burke, Collier, Cologne, Conrad, Coolidge, Cusanovich, Grant, Lanterman, Monagan, Mulford, Pattee, Schrade, Sedgwick, and Wolfrum

February 9, 1961

REFERRED TO COMMITTEE ON EDUCATION

An act to amend Sections 10504 and 10505 OF THE EDUCATION CODE, *relating to use of school property.*

The people of the State of California do enact as follows:

SECTION 1. Section 10504 of the Education Code is amended to read:

10504. Any use, by any individual, society, group, or organization for the commission of any act intended to advocate or teach concrete action for the overthrow of the government of the United States or of the State by force, violence, or other unlawful means shall not be permitted or suffered.